such an agreement as was there in question, and a mere "voting trust." This was shortly followed by *Kreisel* v. *The Distilling Co.* (see RECENT DECISIONS). The Chancellor made no reference to *Clowes* v. *Miller*, but rested his decision on *Taylor* v. *Griswold*, *Cone* v. *Russell* and *White* v. *Tire Co.* *Held*, that where a proxy is revocable, the stockholder sufficiently retains the power to exercise his individual judgment within the doctrine of *Taylor* v. *Griswold*. But if the grant of power is irrevocable and for a fixed time, then its validity must depend on the purpose for which it is given. A like doctrine is applicable to the creation of a trust and the appointment of a trustee to whom the title of the stock is conveyed. A distinction is drawn between a voting trust to provide for the carrying out of a plan already formulated by the stockholders in the exercise of their own judgment, as against one both to formulate and carry out (see, also, *Shepang Voting Trust Case, supra*). In this case it will be noted that there was no question of the transfer of the equitable interest, or of the right to direct the voting being intended to be personal to the transferor.

RECENT DECISIONS.

HAROLD WALKER, *Editor-in-Charge.*

AGENCY—BROKER'S DUTY TO REPORT NAME OF PURCHASER.—Defense, to suit for commissions, that broker did not disclose the name of the purchaser of realty. *Held*, inasmuch as defendant has not shown that this knowledge would have influenced her conduct, nor that plaintiff had any interest in the matter, plaintiff could recover. *Veasey* v. *Carson* (58 N. E. [Mass.]), Oct. 19, 1900.

This case sets a reasonable and just limit to the doctrine that it is the duty of the agent to give the principal notice of facts material to the agency, or which might influence the principal in his actions. *Harvey* v. *Turner* (4 Rawle [Penn.], 223), 1833; *Arrott* v. *Brown* (6 Whart. [Penn.], 9), 1840; *Devall* v. *Burbridge* (4 Watts & Serg. [Penn.], 305), 1842; *Moore* v. *Thompson* (9 Phila., 164), 1873; *Murray* v. *Beard* (102 N. Y., 505), 1886; *Hegenmyer* v. *Marks* (37 Minn., 6), 1887. In *Rich* v. *Black & Baird* (173 Pa. St., 92), the failure to disclose the real purchaser barred recovery because the agent himself was the real purchaser, and, of course, had an interest; and in *Humphrey* v. *The Eddy Transportation Co.* (65 N. W., 13 [Mich.]), 1895, the antagonistic interest of the agent was proven.

AGENCY—REAL ESTATE AGENT—SCOPE OF AUTHORITY.—*Held*, that a real estate agent acting under instructions to *sell* cannot bind his principal by entering into a contract to sell the property. *Armstrong* v. *Oakley* (62 Pac. Rep., 499 [Wash.]). Oct., 1900.

In the construction of an agent's powers in the purchase and sale of real estate a stricter interpretation prevails than in the case of chattels. Where the agent is a professional broker, the rule of the principal case produces a satisfactory result, since the middleman's duty may be considered as discharged when he has introduced to the owner a person who subsequently purchases the land. *Desmond* v. *Stebbins* (140 Mass., 339), 1885. However, when a clear intent that the agent shall do more than this is expressed, power to enter into a binding contract on behalf of the principal would seem to be of the essence of the authority, the agent not being able to execute a conveyance because of the Statute of Frauds.

Haydock v. *Snow* (40 N. Y., 363), 1869. In several of the States which hold that authority to sell land necessarily includes the power to bind the principal by contract, the Statute of Frauds requires that the agent's authority be in writing.

BILLS AND NOTES—PAROL EVIDENCE—COUNTERCLAIM.—Action on a promissory note. Defendant pleaded as a counterclaim, (1) that the note was given in payment for certain shares of stock under the agreement, that whenever defendant should desire to return the said stock, the plaintiff would repurchase it by delivering up the note; (2) that the defendant had offered to return the stock and had demanded the note, but without success. Plaintiff objected to evidence being given under this plea, alleging that it tended to vary the terms of the note. *Held*, that the evidence was admissible. *Germania Bank* v. *Osborne* (83 N. W., 1084). Supr. Ct. of Minn., Oct. 25, 1900.

The evidence offered in support of the counterclaim tended to make out a case which would defeat the collection of the note, but it did not tend to change its terms. If payment could be enforced at all, it must be according to the terms of the note. But there was, under the issue tendered by the counterclaim, the question of the right to enforce payment of the note. The distinction between a defense and counterclaim was made in *Manufacturing Co.* v. *Potts* (59 Minn. 240; 61 N. W. 23), 1894. *Allen* v. *Furbish* (4 Gray, 504), 1855, and *Hatch* v. *Hyde* (14 Vt., 25), 1842, are to be distinguished from the present case. In both of those cases, evidence of collateral agreements was excluded; but there the agreements were pleaded as defenses in bar to the action.

BANKRUPTCY—PREFERENCE—INNOCENCE OF BOTH CREDITOR AND DEBTOR—CREDITOR'S ABILITY TO PROVE BALANCE OF HIS CLAIM.—Payment of money by debtor who was later shown to have been insolvent, but was ignorant of the fact at the time, to a creditor who was unaware that the payment was a preference. *Held*, not to be such a preference as to bar the creditor from proving the remainder of his claim, under SECTS. 57*g* and 60*a*. The court distinguishes this case from *Electric Co.* v. *Worden*, on the ground that in the latter case the debtor knew of his insolvency and intended to make a preference, while here he had no such intention. *In re Smoke* (4 Am. Bank R., No. 3, 434), August, 1900. SEE NOTES.

BANKRUPTCY—PREFERENCE—INNOCENCE OF CREDITOR—ELECTION TO RETAIN PREFERENCE, OR RETURN AND PROVE CLAIM.—A payment by an insolvent debtor on account to a creditor, within four months prior to the adjudication in bankruptcy, the creditor having no knowledge of any attempt to give him a preference. *Held*, this was a preference under SECT. 60, the enforcement of which would grant to one creditor a larger percentage of his claim than to any other. Although the trustee could not avoid this preference because the creditor had no knowledge of it, still, by SECT. 57*g*, the creditor will be barred from proving the remainder of his claim, if he retains this preference. *In re Fixen & Co.* (4 Am. Bank R., No. 1, page 10), May, 1900. SEE NOTES.

COMITY—RIGHT OF FOREIGN RECEIVER TO SUE.—The receiver of a Minnesota corporation brings suit in Iowa to foreclose a mortgage in his own name "as receiver of," etc. Plaintiff alleges that the note and mortgage were duly assigned to him after his appointment as receiver. *Held*, on demurrer for want of capacity to sue: that a foreign receiver cannot sue without express statutory authority to do so; but even where the doctrine of comity is not recognized as to litigants in a representative capacity, the assignee of property may maintain an action as of right. *Cole* v. *Cunningham* (133 U. S., 107), 1890; *Toronto General Trusts Co.* v. *C., B. & Q. R. Co.* (123 N. Y., 37), 1890. The words "as receiver," etc., might be treated as descriptive of the person merely, and not as an essential part of the pleading. Demurrer overruled. *Hale* v. *Harris et al.* (83 N. W., 1046), Sup. Ct. of Iowa, Oct. 25, 1900.

CONSTITUTIONAL LAW—NATURALIZATION OF PORTO RICANS—SUFFRAGE.—*Held*, the Treaty of Peace with Spain does not naturalize Porto

Ricans, in the absence of congressional action. Hence, they are not citizens of the United States, and have no right of suffrage.—*The People of the State of New York ex rel. Frank Juarbe, Relator*, v. *The Board of Inspectors, etc.* (*32 Misc. 584*), Oct., 1900. SEE NOTES.

CONTRIBUTORY NEGLIGENCE.—Plaintiff received injuries in an attempt to save her three-year-old child from being run over by defendant's car. *Held*, contributory negligence not shown, even though the child was in a city street unattended. *West Chicago Street Ry. Co.* v. *Liderman*, (58 N. E., 367 [Ill.]), Oct. 19, 1900.

It is not negligence *per se* to allow a young child to be in a city street unattended, *Chicago* v. *Major* (18 Ill., 349), 1857; *Birkett* v. *Ice Co.* (110 N. Y., 504), 1888; *Creed* v. *Kendall* (156 Mass., 291), 1892; *McNeil* v. *Ice Co.* (173 Mass., 577), 1899, and this is true regardless of the question whether its parents are sufficiently well-to-do to provide an attendant. *Fox* v. *Railway Co.* (118 Cal., 55), 1897; *Hagan's Petition* (5 Dill., 96), 1879; *Mayhew* v. *Burns* (103 Ind., 328), 1885; *Ry. Co.* v. *Pitzer* (109 Ind., 179), 1886, though the poverty of the parents has been thought important in some cases. Beach on Contributory Negligence and cases there cited. *Hedin* v. *Ry. Co.* (26 Ore., 155), 1894.

When human life is in danger the law will not impute negligence to one who attempts a rescue, if he does so with a reasonable expectation of success. *Eckert* v. *R. R. Co.* (42 N. Y., 502), 1870.

CORPORATIONS—POOLS AND VOTING TRUSTS.—Agreement between majority of stockholders of defendant corporation and certain trustees. Stockholders to transfer their stock and entire legal title thereto for five years, to the trustees named, who were given power to formulate and put into effect a plan to increase the capital of defendant company. Application by minority stockholder for preliminary injunction restraining trustees from voting stock. *Injunction granted. Held*, the agreement is contrary to public policy, in that it provides for management of the corporation, during a fixed period of time, by the judgment of others than stockholders. *Kreisel* v. *The Distilling Co. of America.*—(In Chancery of N. J.)—Oct. 1900. SEE NOTES.

CORPORATIONS—RESERVED POWER OF REVOCATION OF CHARTERS—DARTMOUTH COLLEGE CASE—Three recent cases in Delaware have held that the clause of the State Constitution of 1831, which authorizes the Legislature simply to *revoke* charters granted to corporations, without giving authority to alter or amend, gives the right to the Legislature to revoke any part of a charter—any separate franchise, or part of a franchise. *Wilmington City Railway Co.* v. *Wilmington & B. S. Railway Co.* (46 Atl. 12), May, 1900; *Same* v. *People's Railway Co.* (47 Atl. 246), Oct., 1900; *Mayor of Wilmington* v. *Addicks* (47 Atl. 366), Oct., 1900.

A charter, considered as a contract between the State and the corporation, can be, in absence of legislative provision, revoked or altered only by agreement of the parties. The Constitution has provided that the contract may be revoked, without providing for possible alteration. The cases cited hold that the power of revocation includes the power of alteration.

Whatever objection to this holding may be found, it is certainly within the power of the Legislature to alter the contract through the power to revoke. For revocation may at any time follow a refusal to accept alterations. This makes superfluous the decision that the clause gives the Legislature, at once, two powers, of revocation and alteration.

CORPORATIONS—RESERVED POWER OF REVOCATION DISTINGUISHED FROM RIGHT TO REVOKE FOR ABUSE OR NON-USER.—The Constitution of 1831 gave the Legislature the right to revoke corporate charters. The Constitution of 1897 stipulated that revocation for abuse or non-user of corporate franchises should be effected only in the courts at the suit of the Attorney-General. Plaintiff corporation contends that the act granting defendant corporation a franchise along streets in which plaintiff had an exclusive franchise is unconstitutional, as the proper steps have not been

taken through the courts. *Held*, the clause of the Constitution of 1897 did not deprive the Legislature of its right to revoke without cause. *Wilmington City Ry.* vs *People's Railway Co.* (47 Atl. 246), Oct., 1900.

The result of this decision is a further strengthening of the efficacy of the revoking clause of the Constitution of 1831.

CORPORATIONS—STATUTE AUTHORIZING CUMULATIVE VOTING INCLUDED IN GENERAL RESERVATION BY STATE OF POWER TO AMEND CHARTER.—By the Constitution of Michigan of 1850, Art. 15, § 1, "Corporations may be formed under general laws. All laws passed pursuant to this section may be amended, altered, or repealed." In 1870 the Michigan Mutual Life Insurance Company was organized under such a law authorizing the company to prescribe the manner of electing directors. In 1885 the Legislature passed an act authorizing cumulative voting for directors in contravention of the charter and by-laws of the company. The plaintiffs exercised this right and claimed a seat on the board. *Held*, for the plaintiffs. *Looker* v. *Maynard* (21 Sup. Ct. Rep. 21), Sup. Ct. of U. S. Nov. 15, 1900.

It has been repeatedly held that the reservation of a general power to alter, amend, or repeal, gives the right to make any such alteration or amendment as will not impair the object of the grant or any right vested under the grant. *Miller* v. *New York* (15 Wall. 478), 1872, upheld the constitutionality of a statute authorizing the City of Rochester to change the number of directors in a railroad company, though the dissenting opinion held the agreement modified was between third parties, outside of and collateral to the charter, and hence beyond the legislative power to amend. That case cannot be distinguished in principle from the case at bar.

In *State* v. *Greer* (78 Mo., 188), 1883, there was no such general reservation of the power to amend, and a statute altering the voting power of the shareholders was deemed unconstitutional.

CORPORATIONS—STOCK IN TRUST—RESERVATION OF RIGHT TO VOTE IN CESTUI QUE TRUST—EFFECT OF TRANSFER OF CESTUI QUE TRUST'S INTEREST.—Where plaintiffs A and B gave their stock to X, in trust, B retaining the right to vote the shares, *Held*, a transfer by B of his interest, to defendant, does not give to defendant B's right to vote the shares, which was purely a personal right. *Clowes* v. *Miller* (47 Atl., 845), N. J., Chancery, 1900.

The deposit in trust here was not simply a deposit for voting, or "voting trust," but a trust for certain purposes of ultimate disposal. Hence, in the absence of any express provision in the trust agreement, the trustee would have the power of voting. A provision similar to that enabling B to direct the voting, he being a joint, equitable owner, has been held valid and not against public policy, *Hey* v. *Dolphin* (36 N. Y. Sup. 627, and cases cited, page 632), 1895; *Chapman* v. *Bates*, N. J. Ch. (46 Atl. 591), 1900. But the right was intended to be purely personal to B, under the terms of the trust, and it could not therefore be transferred to defendant. On the other hand, it has been held that an irrevocable power of voting or directing the votes on stock cannot be vested in a person who is neither interested in the stock nor a representative of persons interested. *White* v. *Tire Co.* (52 N. J. Eq. 178, and 28 Atl. 75, and cases cited), 1893.

EQUITY—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.—Defendant, a physician, in consideration of $100, entered into a written agreement to sell his good will and to refrain from practicing in the vicinity. In a suit to restrain the defendant from practicing, *Held*, the defendant could not set up breach by the complainant of an oral agreement to buy defendant's house, $900, treating the $100 as part of the purchase-price. Injunction granted. *Lemon* v. *Randall* (83 N. W. 994), Supr. Ct. of Mich., Oct. 31, 1900.

Parol evidence would have been admissible to show that by fraud, mistake, or surprise the written agreement did not contain the real terms (2 White & T. Lead. Cas. Eq., pp. 929, 496); *Chambers* v. *Livermore*

(15 Mich., 381), 1867. But the court will not refuse specific performance unless it be satisfied that the written agreement would not have been entered into if its true effect had been understood. *Watson* v. *Marston* (4 DeGex, M. and G., 230), 1853. In the present case defendant signed the writing with a full understanding of its terms. There was no mistake. The oral agreement, therefore, was simply void under the Statute of Frauds.

INSURANCE—EFFECT OF CLAUSE IN POLICY DEFINING THE LOCUS OF THE CONTRACT.—A clause stipulated that the policy should be interpreted by the Laws of New York. A statute of Missouri, where the policy was taken out, conflicted with the Laws of New York. *Held*, Missouri laws apply. *New York Life Insurance Co.* v. *Cravens* (20 Sup. Ct. Rep. 962), May 28, 1900.

In *Equitable Life Insurance Co.* v. *Clements* (140 U. S. 226), 1890, this particular Missouri statute was held mandatory. A State may prescribe rules by which foreign corporations shall do business; its limitations upon the power of contracting are conditions of the permit and accepted with it, except where the corporation rests its right upon the Federal nature of its business. *Waters-Pierce Oil Co.* v. *Texas* (177 U. S., 28), 1899. Such a policy of life insurance is not an interstate contract so as to be entitled to immunity from State control, nor is the business of life insurance interstate commerce. In *Philadelphia Fire Asso.* v. *New York* (119 U. S., 110), 1886, it was held that fire insurance, and in *Hooper* v. *California* (155 U. S. 648), 1894, that marine insurance, were not interstate commerce.

INTERNATIONAL PRIVATE LAW—CARRIAGE BY SEA—HARTER ACT—EXEMPTION OF NEGLIGENCE.—Goods shipped in an English vessel from Buenos Ayres for New York under bills of lading exempting carrier from liability for negligence and stipulating that the law of the ship's flag should govern the contract. In an action for damage to cargo, *held*, under Harter Act of 1893, Chap. 105, § 1 [27 Stat. at L., 445], United States courts could give no validity to exemptions from negligence, and must apply their own law, irrespective of the contract of the parties, in all cases of voyages "from or between ports of the United States and foreign ports." *Knott* v. *Botany Worsted Mills* (21 *Sup. Ct. Rep.* 30).

This was a case of first impression in the Supreme Court (GRAY, J. at p. 31), and it was unfortunate that it should have turned entirely on the construction of a statute. In effect the courts decided that any rules of international private law which might have governed such a contract were done away with by the statute and the *lex fori* alone made applicable. In the absence of any statute the result would probably have been different [*see remarks of* GRAY, J., *in Liverpool S. S. Co.* v. *Phenix Ins. Co.*, 129 *U. S. at page* 458], though the tendency of the lower courts had always been to apply the *lex fori* in such cases whether there was a stipulation for foreign law or not. *The Brantford City* (29 *F. R.* 373), 1886; *Lewisohn* v. *Nat'l S. S. Co.* (56 *F. R.* 602), 1893; *The Energia* (56 *F. R.* 124), 1893; *The Guild Hall* (58 *F. R.* 796), 1893. There was, however, a strong case the other way in *The Oranmore* (24 *F. R.*, 922), 1885.

MASTER AND SERVANT—DUTY TO INSTRUCT—ASSUMPTION OF RISK.—Plaintiff had been assigned to duty as a regular brakeman. The head switchman knowing his inexperience set him to make a coupling. Plaintiff was injured in the attempt. *Held*, that the Master knowing that particular skill was required which servant had not, and the danger not being apparent because of such inexperience, the risk was not assumed. *Louisville & N. Ry. Co.* v. *Miller* (104 Fed. 124). October 2, 1900.

An identical state of facts arose and this principle was applied in the *Ill. Central R. R. Co.* vs. *Price* (18 So. 415 [Tenn.]), March 25, 1895.

The case accords with the great weight of authority, established by a long line of decisions in New York, Massachusetts, Indiana, Vermont,

Mississippi, Wisconsin, Maine and Texas. *Contra*, *Dysinger* vs. *Railway Co.* (93 Mich., 646), 1892. *McDermott* v. *R. R. Co.* (56 Kas. 319), 1899.

MORTGAGES—FUTURE ADVANCES—PRIORITY OF LIEN.—A mortgage recited it was given to secure a certain note, and in case grantor became further indebted to grantee, to secure other notes to be given by him. Thereafter mortgagee received of mortgagor another note for sums lent after first mortgage, and a new mortgage to secure it. Between dates of the two mortgages, one King obtained mechanics' lien on premises without knowledge of any transactions except as appeared by first mortgage. Mortgagee had no knowledge of King's employment. *Held*, as against King the second mortgage was ineffectual, and the first secured nothing but money lent before its execution. The mortgage should have shown an agreement to make the future advances and named amount to which they might be made. No duty of inquiry rested on King. *Balch* v. *Chaffee et al.* (47 Atl. 327). Sup. Ct. of Conn., Nov. 1, 1900.

This case represents the peculiar Connecticut doctrine. In general the first mortgage would be held to cover future advances until notice of subsequent lien to the mortgagee. (Jones on Mortgages, § 367, 368, and cases cited.) In *Pettibone* v. *Griswold*, (4 Conn. 162), 1822, and *Stoughton* v. *Pasco* (5 Conn. 448), 1823, such a mortgage was held void, as against creditors, for indefiniteness, as giving no reasonable notice of the encumbrance; and in *Shepard* v. *Shepard* (7 Conn. 387), 1828, a provision for future endorsements was held ineffectual as against a subsequent encumbrancer notwithstanding a stipulation that the notes endorsed should not at any time exceed $1,200. *North* v. *Belden* (13 Conn., 381), 1388, *accord.*

MORTGAGES—PRIOR UNRECORDED CHATTEL MORTGAGE VALID AS AGAINST SUBSEQUENT MORTGAGEE WITH NOTICE—BURDEN OF PROOF—INSOLVENCY—PREFERRED CREDITORS.—X mortgaged certain goods to A, but the mortgage was not recorded until after X had mortgaged the same goods to B (who had notice of A's mortgage) and made a general assignment for the benefit of creditors to Y. *Held*, that A has a prior lien; the burden was on B to prove that he took his mortgage without notice of A's prior mortgage. *Diemer* v. *Guernsey et al.* (83 N. W. 1047 [Iowa]), Oct., 26, 1900.

The burden of proving he is within the class against whom a prior unrecorded mortgage is invalid by statute (Code of Iowa, 1897, Sec. 2906) is here properly made to rest upon the second mortgagee. Under a similar statute in New York (N. Y. Rev St., 9th Ed., p. 2013) a similar result has been reached. *Button* v. *Rathbone* (126 N. Y., 187, 192), 1891. But the burden of proving such notice has been held to rest upon the holder of a prior unrecorded mortgage of real estate. *Barnett* v. *Squyres* (54 S. W., 241 [Tex.]), 1899.

QUASI CONTRACT—RECOVERY OF MONEY PAID IN MISTAKE OF LAW BY AN AGENT.—Recovery allowed in a suit by the United States to recover money paid to an army officer by a paymaster through a misinterpretation of an Article of War. *United States* v. *Dempsey* (104 Fed. 197), Sept., 1900.

The cases cited in the opinion all lay it down as a principle that the government may recover money paid under a mistake of law made by one of its agents. *McElrath* v. *U. S.* (102 U. S. 441), (26 L. Ed. 189), 1880; *Wisconsin Cent. R. Co.* v. *U. S.* (164 U. S. 190), (17 Sup. Ct., 45), (41 L. Ed., 399), 1896. Such a payment, by an agent acting under a statute is like any payment by an agent acting in excess of his authority, and cannot bind the principal whether the principal is the government or a private individual. The defense of payment under mistake of law is available only when the mistake was the mistake of the plaintiff; and where the mistake was made by the plaintiff's agent, the plaintiff can be held only on the principle of estoppel. But an agent cannot be said to have been held out to the world as having authority to pay money in mistake of law, and the defendant, who has received such payment cannot be said to have been injured by reliance on plaintiff's representations. The decision is

sound, but should not be confined to cases where a government agent has made the mistake of law. *Whiteside* v. *United States* (93 U. S. 247), 1876; *Hawkins* v. *United States* (96 U. S. 689), 1877; *United States* v. *Burchard* (125 U. S. 176), 1888.

REAL PROPERTY—ESTATE BY THE ENTIRETY IN NEW YORK.—A freehold estate is granted to husband and wife. *Held*, that they take as tenants of the entirety, notwithstanding Section 56 New York Real Property Law, which declares that "every estate granted" "to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy." *Price* v. *Pestka*, Nov., 1900 (54 N. Y. App. Div., 59). SEE NOTES.

REAL PROPERTY—TRADE FIXTURES—AS BETWEEN TENANT AND MORTGAGEE.—X leased his land to A, selling him a two-third interest in a greenhouse upon it; and subsequently he mortgaged the land to B, who had no notice of the sale of the greenhouse. Before his lease had expired A had it renewed with the privilege of removing the greenhouse at the end of the term; and now, during A's second term, B sues to foreclose the mortgage. *Held*, that A may remove the greenhouse, since it was a trade fixture, and X treated it as personalty; and *held* that A did not lose his right to remove by failure to exercise it at the end of his first term. *Royce* v. *Latshaw* (62 Pac. 627), Colo., Oct., 1900.

Certainly the fact that the greenhouse was a trade fixture would have been a good defense as against the landlord. *Grymes* v. *Boweren* (6 Bing., 437), 1830; *Updegraff* v. *Lesem* (62 Pac. 342), Colo., 1900. And such fixtures do not pass to the landlord by the renewal of the lease. *Sumsch* v. *Kohn* (49 N. Y. Supp. 176), 1898; at least when the tenant expressly stipulates for the continued right to remove them. *Watriss* v. *Bank* (124 Mass. 571), 1878. But here it appears that the greenhouse was not annexed *by the tenant* nor during his term, so the case is not within the reason of the rule regarding trade fixtures.

And, at common law, an agreement by the mortgagor of the realty to regard fixtures as personalty is void as against the mortgagee. *Clary* v. *Owen* (15 Gray [Mass.], 522), 1860; *Porter* v. *Steel Co.* (122 U. S. 267); *McFadden* v. *Allen* (134 N. Y. 489), 1892; [but see *Ford* v. *Cobb* (20 N. Y. 344), 1859, and *Tifft* v. *Horton* (53 N. Y. 377)]; at least where the mortgagee had no notice of the agreement. *Hunt* v. *Iron Co.* (97 Mass., 279).

REAL PROPERTY—TRESPASS—ONE ASSUMING TO GRANT BY LEASE THE PROPERTY OF ANOTHER LIABLE FOR THE TRESPASSES COMMITTED BY THE LESSEE—DAMAGES.—*Held*, where B, mining coal under a lease from A, has paid to A percentages for coal taken from C's land, which was negligently included in A's lease to B, B is not liable to C for the coal taken out, but A is liable, as he authorized the trespass. Measure of damages, the value of the coal after it was severed from the soil, but before it was carried to the mouth of the pit. *Donovan* v. *Coal Co.* (58 N. E. [Ill.], 290), Oct. 1900.

The decision is not put on the ground of any agency of B for A. For the general proposition that one who "authorizes," or, as the Appellate Court put it, "requests, or aids and abets" a trespass, no authority is cited. Inexact analogies, however, may be found in *Williamson* v. *Fischer* (50 Mo. 198), 1872; *Mallory* v. *Merritt* (17 Conn. 178), 1845; *Judson* v. *Cook* (11 Barb. [N. Y.] 642), 1852; *McMurtrie* v. *Stewart* (21 Pa. St. 322), 1853, and a dictum in *Ross* v. *Fuller* (12 Vt. at 271), 1839.

The measure of damages adopted is correct. *Wood* v. *Morewood* (3 Q. B. 440, note), 1842; *Martin* v. *Porter* (5 M. & W. 351), 1839; *Coal Co.* v. *Ogle* (82 Ill. 627), 1876.

SURFACE WATER—ARTIFICIAL DRAINS—ADJACENT LANDS.—The defendant, it is claimed, by a system of tile underdrainage increased the flow of surface water upon the plaintiff's adjacent land. *Held*, that the right of the owner of land to improve it is not restricted by any right in his neighbor to have his land free from the flow of surface water in unusual quantities. *Connell* v. *Stark* (83 N. W. 1092 [Wis.]), Oct. 30, 1900.

This holding was not called for by the facts, for the court here approved the finding that defendant's improvements "*decreased* the amount of surface water flowing from his land." Ignoring this, however, the decision finds support in *Gannon* v. *Hargadon* (10 All. [Mass.] 106), 1865, upon which it is rested by the court. See also *Cassidy* v. *R. R. Co.* (141 Mass. 174, 178), 1886; *Goodale* v. *Tuttle* (29 N. Y. 459, 467), 1864; *Barkley* v. *Wilcox* (86 N. Y., 140), 1881; *Bowlsby* v. *Speer* (2 Vroom, 351), 1865; *Eulrich* v. *Richter* (41 Wis. 318, 320), 1877; *Gibbs* v. *Williams* (25 Kan. 214), 1881; *Rawstron* v. *Taylor* (11 Exch., 367, 384), 1855. By the civil law the lower proprietor is bound to receive only so much surface water as flows *naturally* upon his land, and this rule has been adopted in several States. *Gillham* v. *R. R. Co.* (49 Ill. 484), 1869; *Ogburn* v. *Connor* (46 Cal. 346), 1873; *Martin* v. *Riddle* (26 Pa. St. 415), 1856; *Hays* v. *Hays* (19 La. 351).

SURETYSHIP — CONSIDERATION NECESSARY TO SUPPORT AN ORIGINAL PROMISE.—*Held*, promise by a wholesaler to continue to furnish wife of deceased with goods for the shop she took by her husband's will, and to forbear to press his claim, is not sufficient consideration to make the wife's promise to pay her husband's debts for goods furnished, an original promise. *Cardeza* v. *Bizsop* (66 N. Y. Sup. 408), Nov. 15, 1900.

It is submitted that the decision is wrong. Plaintiff relinquished a right to attach the goods or to take out administration. This has been held to be sufficient consideration, moving directly between the parties (see Browne on the Statute of Frauds, § 190, and cases cited; Ames, Cases on Suretyship, p. 30, note 2); cf. also *Meriden Co.* v. *Zingsen* (48 N. Y. 247), 1871, and *Tomlinson* v. *Gill* (1 Ambler, 330), 1756; *Watson* v. *Randall* (20 Wend. 201), 1838 holds an agreement to forbear to sue a debtor a good consideration for the promise of a third person to pay the debt, but that the promise must be in writing.

SUSPENSION OF POWER OF ALIENATION—NEW YORK RULE AGAINST PERPETUITIES IN EQUITABLE ESTATES.—Real estate was devised in trust to divide the income equally among four beneficiaries and their survivors, after the death of the last survivor the fee to vest in a corporation. *Held*, the entire devise is valid. The rule against perpetuities is not violated. *Mills* v. *Mills* (50 N. Y. App. Div., 221), decided Apr., 1900. The dissenting opinions confuse impossibility of alienation with probability that the estate will not be alienated. SEE NOTES.

WATER COURSES—RIPARIAN RIGHTS.—The defendant, one of a number of salt manufacturers on a creek, by the operation of its works in the ordinary way and without negligence, has diminished the flow of water in the creek and polluted it, so as, to some extent, to deprive the plaintiffs, who are lower riparian owners, of its beneficial use. *Held*, that the plaintiffs' rights must be protected though they conflict with the profitable exercise of an important industry. *Strobel et al.* v. *Kerr Salt Co.* (164 N. Y. 303; 58 N. E. 142), Oct. 2, 1900. (Reversing 49 N. Y. Supp., 1144, [1897]).

This is an obvious application of the common law rule governing the rights of riparian owners. *Embrey* v. *Owen* (6 Ex. 353), 1851; *Rubber Co.* v. *Rothery* (132 N. Y. 293), 1892; 3 Kent Comm. 439-441. The few cases *contra*—*Barnard* v. *Sherley* (135 Ind., 547), 1893, and *Coal Co.* v. *Sanderson* (113 Pa. St. 126), 1886 (of which the latter rejects the rule when great industrial interests are involved)—are examples of judicial legislation, without support in principle, and at least questionable in policy.

WILLS—CHARITABLE BEQUESTS—NOT VOID FOR INDEFINITENESS—TRUSTEES' POWER TO APPOINT.—Testator left his property to his executor in trust to erect church buildings within a limited area and belonging to any of four denominations that trustee might appoint. *Held*, the gift was not void on account of indefiniteness of beneficiaries. *Trafton* v. *Black et al.* (58 N. E.; 292 [Ill.]), Oct., 1900.

The court cited *Crerar* v. *Williams* (145 Ill., 525), 1893, and *Hoeffer* v. *Clogau* (171 Ill., 462), 1898, which are interesting as recognizing

that the Law of Charitable Uses (43 Eliz., C. 4), 1601, is the law of Illinois. It must also be considered to be that of New York, since the decision in *Allen* v. *Stevens* (161 N. Y., 122), 1899, interpreting Chap. 701 L. 1893, where PARKER, Ch. J., declared that the Legislature intended to restore that part of the Statute of Elizabeth relating to charitable uses which had been repealed by Ch. 46 of the Laws of 1788, and that consequently *Williams* v. *Williams* (8 N. Y., 525), 1853, is to be considered as representing the law of this State, and *Holmes* v. *Mead* (52 N. Y., 332), 1873, will be followed no longer.

WILLS—CONSTRUCTION OF CLAUSE OF WILL.—*Wilson* v. *Hays' Executors* (Nov. 1, 1900), 58 S. W., 773 Ky., the Court construed the following clause: "I devise to my beloved wife, for her natural life, the house, &c., "* * * and at her death to my daughter, Kate Wilson, but in the "event she should die without having lawful issue of her body living, "then said lands shall descend to my heirs at law," as giving a life estate to the wife, and, if Kate Wilson be living at the death of the wife, she gets the land in fee. The land goes to the heirs at law *only* in the event that Kate Wilson dies before the wife and leaves no issue of her body. *Wilson* v. *Hays' Executors* (58 S. W., 773 [Ky.]), Nov., 1900.

This is clearly erroneous. First: Kate Wilson gets a vested remainder in fee at once and not upon the contingency of her outliving her mother. Secondly: This vested remainder is liable to be divested upon her dying without lawful issue of her body living.

Whether she die before or after her mother makes no difference. The important fact to divest the remainder is that the condition subsequent be fulfilled. If it is not, the estate is not divested. The condition subsequent is that she die without lawful issue of her body living, and nothing else is necessary.

Divesting clauses are construed strictly. *Doe* v. *Cook* (7 East, 269), 1806; *Wall* v. *Tomlinson* (16 Ves., Jr., 413), 1810; *Doe* v. *Rowdin* (2 B. & Als. 441), 1819; *Vulliamy* v. *Huskisson* (3 Y. & C. 80), 1838; *Illinois Land & Loan Co.* v. *Bonner* (75 Ill. 315), 1874; *Grimball* v. *Patton* (70 Ala., 626), 1881.

WILLS—DEVISE TO TAKE EFFECT IN ENJOYMENT IN FUTURE.—Testator created a trust in his property, real and personal, to be terminated Jan. 1, 1900, the property to be then distributed among L. M. and his four children, in equal portions, in fee, but if any of the said children should die, leaving issue of his body, said issue to receive the same proportion that the parent would have been entitled to. One of the four children died in 1892, himself leaving children, and in 1897 another son was born to L. M. L. M. died before Jan. 1, 1900. *Held*, this son is entitled to share equally in the property. The share of L. M. passes to his intestate estate, and his widow has a statutory interest in that share, after distribution. *Mitchell* v. *Mitchell* (47 Atl. [Conn], 325), Nov. 1, 1900.

The Court applies the general rule that where there is a gift and a direction to pay in the future, or to distribute, the legacy vests, unless some different intention is manifested. *Farman* v. *Farman* (53 Conn., 261), 1885, citing *Smith* v. *Edwards* (88 N. Y. 92), 1882. It does not affect the question of vesting that afterborn children are let in. *Haggerty* v. *Hockenberry* (52 N. J. Eq. 354), 1894. Where there was a bequest to trustees for a daughter for life, and after her death to pay the same to her children when they should attain twenty-one, it was held the legacy vested in the children at birth. *In re Bartholomew* (1 Mac. & G. 354), 1849. In *Goebel* v. *Froelich* (113 N. Y. 405), 1889, there was only a direction to divide at a future time, yet *held* the gift was vested, following the intent to be collected from the whole will.